Pioneer Motor Service Co v Chin Cheng Hong Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO A-02-78 OF 2001

ABDUL HAMID MOHAMAD, MOHD NOOR AHMAD AND ABDUL AZIZ JJCA

9 JUNE 2003

Company Law *— Register of members — Rectification of — Circumstances in which rectification permitted — Companies Act 1965 s 162*

The directors of the appellant company had approved the transfer of 156,400 shares to Constant Aim Sdn Bhd (a non-member), disregarding art 31 of the articles of association of the appellant company which provide that where a member wished to transfer his shares, all other members were to be given an opportunity to acquire the shares before they could be transferred to a non-member. The respondent company, a member of the appellant company sought in the High Court the cancellation of the directors' resolution and rectification of the register of members under s 162 of the Companies Act 1965. The respondent's application was allowed. The appellants appealed.

Held:

(1) It is clear from s 162(1) of the Companies Act 1965 that the power to order rectification is discretionary, because even if a situation giving cause for rectification exists, the section says that the court may refuse the application or may order the rectification of register (see p 519H).

(2) On the facts of the case, the directors had blatantly disregarded art 31 of the articles of association without giving notice to the respondent and this was tantamount to riding roughshod over the rights and privileges of the respondent company as a member of the appellant company. There was therefor a basis for the rectification of the register by virtue of s 162 of the Companies Act 1965 (see p 515C–D).

[Bahasa Malaysia summary

Pengarah-pengarah syarikat perayu telah meluluskan pemindahan 156,400 saham-saham ke Constant Aim Sdn Bhd (bukan ahli), dengan tidak mengendahkan perkara 31 artikel penubuhan syarikat perayu yang memperuntukkan bahawa di mana satu ahli berhasrat memindahkan saham-saham beliau, kesemua ahli-ahli lain akan diberikan peluang memperoleh saham-saham tersebut sebelum ia dipindahkan kepada seorang yang bukan ahli. Syarikat responden, satu ahli syarikat perayu, memohon di Mahkamah Tinggi bagi pembatalan resolusi pengarah-pengarah dan pembetulan atas daftar

ahli-ahli di bawah s 162 Akta Syarikat 1965. Permohonan responden dibenarkan. Perayu-perayu tersebut merayu.

Diputuskan:

(1) Ia adalah jelas dari s 162(1) Akta Syarikat 1965 bahawa kuasa untuk memerintahkan satu pembetulan adalah mengikut budi bicara mahkamah, kerana meskipun terdapat satu keadaan yang memerlukan pembetulan, seksyen tersebut menyatakan bahawa mahkamah boleh menolak permohonan tersebut atau boleh mengarahkan pembetulan atas daftar (lihat ms 519H).

(2) Berdasarkan fakta-fakta kes, pengarah-pengarah tersebut telah secara terang-terangan tidak mengendahkan perkara 31 artikel pertubuhan tanpa memberikan notis kepada responden dan ini sama seperti bertindak sewenang-wenangnya terhadap hak-hak dan perlindungan responden syarikat sebagai satu ahli perayu syarikat. Oleh itu ada asas untuk pembetulan atas daftar menurut s 162 Akta Syarikat 1965 (lihat ms 515C–D).]

Notes

For cases on rectification of register, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 614–619.

Cases referred to

Grant & Ors v John Grant & Sons Proprietary Limited & Ors [1950] 82 CLR 1 (distd)

Sichell's Case (1867) LR 3 Ch Appl 119 (refd)

Legislation referred to

Companies Act 1965 s 162(1)

Companies Act 1936 [NSW] s 83(1)

Appeal from: Originating Summons No 24–922 of 1994 (High Court, Ipoh)

Norazali Nordin (*Chan & Assoc*) for the appellants.

A Iruthaya Raj (*Raj Selva & Co*) for the respondents.

Abdul Aziz JCA (delivering judgment of the court): Article 31 of the articles of association of the appellant company contained pre-emptive provisions to ensure that where a member wished to transfer his shares, all other members were given an opportunity to acquire the shares before they could be transferred to a non-member. On 27 September 1993, the directors of the appellant company approved the transfers of 156,400 shares to Constant Aim Sdn Bhd, a non-member, and the transfers were subsequently effected in disregard of art 31. The 156,400 shares comprised 77,219 shares of Ong Seng Tee & Sons Bhd, 22,781 shares of Ong Seng

Tee and 56,400 shares of Ong Seng Sek Holdings Sdn Bhd. The directors in fact resolved that art 31 be dispensed with, and although according to the minutes of the directors' meeting of 27 September 1993 the dispensing with art 31 was in respect of the transfer of the 77,219 shares of Ong Seng Tee & Sons Sdn Bhd, the appellants, in para 5 of their affidavit dated 22 November 1994 in the High Court, affirmed that the dispensing was in respect of the three transfers.

Aggrieved that notice of the proposed transfers had not been given to all members as required by art 31, and saying that had notice been given to them they would have been prepared to buy the shares, the respondent company, a member of the appellant company, sought in the High Court by originating summons the cancellation of the directors' resolution of 27 September 1993 as a nullity and rectification of the register of members under s 162 of the Companies Act 1965 by removing therefrom Constant Aim as the holder of 156,400 shares and making the appropriate insertions in lieu. The judge allowed the respondent company's application, on the finding that the conduct of the directors in dispensing with art 31 without giving notice to the respondent company was 'tantamount to riding roughshod' over the rights and privileges of the respondent company as a member of the appellant company and ought not to be countenanced by the court. The appellants appealed to this court.

In their affidavits and written submission in the High Court the appellants raised several defences, of which the major one seemed to be that it was their common practice to obtain the approval of the directors for transfers of shares from a member to a non-member, especially to family members or family companies of existing members. The members of Constant Aim were the three transferor members of the appellant company, namely, Ong Seng Tee & Sons Sdn Bhd, Ong Seng Tee, and Ong Seng Sek Holdings Sdn Bhd, and Ong Seng Tee's wife, and the members of those two companies were individual members of the Ong family, so that Constant Aim could be claimed to be a family company of the three transferor members of the appellant company.

In his oral submission in the appeal, the appellants' counsel, conceding that the transfers of the 156,400 shares to Constant Aim were in breach of art 31, raised only one question as a defence, a question that arose from the fact that the respondent company became a member of the appellant company in 1975 when 59,400 shares were transferred to the respondent company by Madam Lau Kam Ying also with the approval of the directors in disregard of art 31. Out of that fact, in their written submission in the High Court the appellants had made two contentions. One was that since the respondent company came to be a member by a transfer in contravention of art 31, the transfer was void and the respondents had no locus standi to bring the action against the appellants. The other contention was that the power to order rectification under s 162 is discretionary and the court's discretion ought not to be exercised in favor of the respondents because they too became a member through a violation of art 31. In his oral submission in the appeal, the appellants' counsel put the question to be decided as one whether the discretion under s 162 to remove Constant Aim

from the register on account of breach of art 31 ought to be exercised in favor of the respondents who became a member also in breach of art 31, emphasizing that he was taking it as a point of discretion and not as one of locus standi. Therefore the locus standi contention was not pursued in the appeal and virtually the only question to be decided in the appeal was the question of discretion, which could come under grounds 1 and 3 in the memorandum of appeal. A B

The appellants' counsel complained that the judge did not only fail to consider the question of discretion, which was true, but also considered the irrelevant question of the law as to amendment of articles of association, which was also true. On the amendment of articles of association, the judge went to the extent of concluding at p 12 of his judgment 'that any deprivation of this right to vote on the alterating [sic] of the articles, means that any resolution passed subsequently is invalid' and at p 13 'that such an alteration of the articles, without the consent of the members is voidable at the instance of the member who would be prejudicially affected'. It was a fact that when the respondents complained to the appellants about the non-compliance with art 31, the appellants did, in response, propose an amendment of that article so as to legalize the common practice claimed by the appellants, but the respondents did not agree, and nothing further came of it. What was before the High Court was the question of the dispensation with and disregard of art 31 in the transfers to Constant Aim and not the question of any amendment made to art 31 or any other article. C D E

Turning now to the question of discretion, it is necessary to set out certain facts that may be relevant to the question. As I said, the respondent company became a member of the appellant company in 1975 when 59,400 shares were transferred to them by Madam Lau Kam Ying. The directors of the appellant company passed the resolution approving the transfer on 30 April 1975. One of the directors was Chin Yim Wah who, as manager of the respondent company, affirmed the affidavits of the respondent company in this case. (He was not a director of the appellant company when the resolution dispensing with art 31 was made for the transfers to Constant Aim on 27 September 1993). Madam Lau Kam Ying was Chin Yim Wah's mother or stepmother. In cross-examination, Chin Yim Wah said that Madam Lau Kam Ying transferred her shares 'to a family company', that is the respondent company, so that it would appear that the respondent company was Madam Lau's family company. Chin Yim Wah maintained in para 6 of his affidavit dated 6 December 1994 that the transfer to the respondent company in 1975 was with the consent and approval of all members of the appellant company and that none of them objected to the transfer. Ong Seng Tee, in para 8 of his affidavit on behalf of the appellants dated 15 December 1994, denied that the transfer was with the approval and consent of all members. (Ong Seng Tee was a director of the appellant company and was one of the directors who approved the transfers to the respondent company and to Constant Aim). In cross-examination, Chin Yim Wah maintained that all the shareholders agreed to the transfer and that there was no objection from any of them. Ong Seng Tee, in cross-examination, admitted that no shareholder objected to the transfer in 1975, F G H I

A although he did not say that the transfer was agreed to by all the shareholders. The difference is a fine one. To say that all shareholders agreed to the transfer or consented to and approved the transfer may be to imply that they expressly agreed to the transfer before it was effected, but to say that no shareholder objected to the transfer may be to imply that they knew of the transfer after it was effected but did not raise any objection to B it. In the final analysis, it was common ground that no shareholder objected to the transfer. To complete the facts, I would mention that although the respondent company became a member of the appellant company in 1975 by obtaining a transfer of 59,400 shares effected in disregard of art 31, at the time of the transfers to Constant Aim in 1993 the respondent company's C shareholding in the appellant company was 128,238 shares, that is to say, in 1993 the respondent company were a member of the appellant company by virtue of holding very much more shares than they initially obtained in 1975.

I should mention that the cross-examination of Chin Yim Wah and Ong Seng Tee that I mentioned earlier was on their affidavits and was on D the order of the judge to whom there appeared to be some conflict in the affidavit evidence on the question of consent of shareholders to the transfer of shares in 1975 to the respondent company.

To my mind, in view of the importance of the right conferred by art 31 on members, the argument that as the respondent company became a E member of the appellant company in 1975 by virtue of obtaining a transfer of 59,400 shares in disregard of art 31 the court's discretion under s 162 ought not to be exercised in their favor when they sought to expunge the transfers in 1993 of 156,400 shares to Constant Aim in disregard of art 31 could not, by itself, in its bare form, succeed. Before such an argument deserved to even be considered, something more must at least have been F shown, such as that the objection to the 1993 transfers was with improper motives — of which none was shown — or that in taking the transfer in 1975 the respondents placed themselves under some kind of obligation not to object should another transfer also in disregard of art 31 be effected thereafter to another person. Legally of course, there was no such G obligation, but even in any other respect I was not able to see any such obligation. Even if the alleged 'common practice' were to be considered, I was unable to see how a mere common practice of the company could be translated into an implied obligation on the part of a member not to object to a transfer in disregard of art 31 carried out according to the common practice. In any case there was a dispute about the existence of the common H practice, with the respondents maintaining that the practice was discontinued after 1977 and the appellants denying it with the argument that no directors' or shareholders' meeting was ever held to discontinue the practice. When the respondents obtained their shares in 1975, any member of the appellant company was entitled to object and if he persevered in his objection he might have succeeded in nullifying the transfer. The fact was I that no member objected. There was no evidence as to the reason why no member objected but it seemed to me that it could safely be assumed that that was because no member had an interest, or a strong enough

interest, to object. It may or may not be that no member was interested or financially able to buy the 59,400 shares. It could be some other reason. The fact is that no reason was in evidence. It could not have been because of the common practice, in view of the fact that the transfer to the respondents on 30 April 1975 was the earliest evidence produced by the appellants of the existence of the common practice, so that it was probable that the practice did not exist previously and the transfer to the respondents was the start of the common practice, which would not then at that point in time have been a common practice. There was no evidence of any resolution specially made previously to lay down a practice that would be the common practice. In the absence of evidence of the reason or reasons why no member objected to the transfer to the respondents, it was not possible to see why the respondents should be under any kind of obligation not to object to the transfers to Constant Aim in disregard of art 31. The mere fact that no member objected to the transfer to the respondents in disregard of art 31 should not place the respondents under any kind of obligation not to object to a transfer to others in disregard of art 31. There was therefore no sufficient reason for refusing to exercise the power of rectification under s 162.

The case that was cited in the appeal in support of the submission that the discretion under s 162 ought not to be exercised in this case in favor of rectification, and that was also cited in the High Court, was *Grant & Ors v John Grant & Sons Proprietary Limited & Ors* [1950] 82 CLR 1, a decision of a panel of five judges of the High Court of Australia on appeal from the Supreme Court of New South Wales. A number of issues arose in that case, one of which was the question of rectification of the register of members of a company under s 83(1) of the Companies Act 1936 (NSW) in respect of shares alleged to have been transferred in contravention of art 16 of the articles of association of the company, which prohibited the transfer of shares to non-members without their being first offered to the existing members at their fair value. Three of the judges held that the register should be rectified. Latham CJ held that the transfers were valid for a reason which did not have to do with any question of discretion. Fullager J was of opinion that rectification should be refused for two reasons. One reason was akin to Latham CJ's reason for holding that the transfers were valid. The other rested 'on a broader ground of discretion' (p 51). The appellants' counsel invited us to apply Fullager J's decision, saying that the case was similar on the facts to the present case.

In my view, the facts in that case were different in the character of their layout and pattern from the facts in this case. As far as concerned Fullager J's ground of discretion, the facts, going by his judgment, and with the guidance of the headnote, may be simplified as follows. The case arose out of differences between two brothers, Henry and William, and their respective families. When the company was formed in 1922, the allotment of shares proceeded on the footing that the brothers were owners in equal shares. Immediately after the company was incorporated, shares were issued to the brothers and their respective wives, including certain 'trust 'shares' to each of the brothers, in such amounts that in effect the issued

A capital was held equally between Henry's faction and William's faction. On the same date in 1922 itself, Henry and William each executed a deed of trust declaring that they held their respective trust shares on trust for their children. In 1925 and 1926, there were further issues of shares to the brothers in consequence of which William held more shares than Henry. In 1940, Henry, without objection from William, and without complying with B art 16, transferred to his children the shares that he held in trust. But when in 1947 William desired to transfer to his children the shares which he held in trust, Henry and his three children, the four persons who were to become plaintiffs in the case, objected and insisted upon proper compliance with art 16. Henry admitted that his motive for refusing to agree to registration of C the transfers was to put pressure on William to agree to a redistribution of shareholdings which would make the holdings of the two groups equal. That would mean, in my view, that Henry's group were not genuinely interested to purchase the shares that William wanted to transfer. As Fullager J stated at p 46, William's desire to have his children made shareholders in respect of the trust shares 'was opposed for no worthier D purpose than to bring pressure upon him to alter a state of affairs in which [Henry] had acquiesced, most probably for the best of reasons, and which had existed for over twenty years', the state of affairs being William's holding more shares than Henry. William's stand was that he would not press for registration of the transfers if Henry's group would agree to revert to the position before 1940, that is before Henry transferred the trust shares E to his children, when the shares were all held by Henry himself. Subsequently, by moves which are not relevant to the question of discretion and which therefore need not be stated, the transfers to William's children were registered without complying with art 16.

Having found at p 47 that the registration of William's children as F shareholders involved an infringement of art 16 and that their names were therefore, in the words of s 83(1) as also the words of our s 162(1), 'without sufficient cause entered in ... the register', Fullager J said at p 51:

> The power to order rectification of the register must clearly, I think, be in all cases discretionary. The person claiming rectification must show that he has some equity which the court will protect. If he is a shareholder, then prima G facie he shows such an equity if he establishes that a name is wrongly included in or omitted from the register of his company. Some definite reason must be shown, I would think, for refusing rectification before rectification will be refused. But there may be circumstances which justify, or even compel, refusal.

H To me it is also clear from our s 162(1) that the power to order rectification is discretionary, because even if a situation giving cause for rectification exists, such as that the name of any person is without sufficient cause entered in the register, the section says that 'the Court may refuse the application [for rectification] or may order rectification of the register'. It is important to note that, according to Fullager J, some definite reason must I be shown for refusing rectification before it will be refused. The circumstances that to Fullager J justified or compelled refusal of rectification in that case are to my understanding stated at p 52:

> In the present case three of the plaintiffs are themselves, in my opinion, wrongly on the register. Another, [Henry], was instrumental in their being so placed on the register. Neither the interests of the company nor the interests of any of the plaintiffs are in the slightest degree adversely affected by the presence on the register of the names to which objection is taken. The sole object of the plaintiffs is to obtain from [William] his assent to an alteration in a position in which, as I have said, [Henry] was glad enough to acquiesce in the days of the company's prosperity, and which has existed for nearly twenty-five years.

After observing that the position was very like that which existed in *Sichell's Case* (1867) LR 3 Ch Appl 119, Fullager J concluded:

> In all these circumstances, I am of opinion that rectification should have been refused unless the plaintiffs were prepared to agree to a corresponding rectification of the entries which were made in 1940, and this they have refused to do.

As far as facts are concerned, it should be apparent that in that case the dispute was essentially between two brothers who virtually owned a company, one of whom had transferred shares to his children in contravention of art 16 and now objected, on the ground of art 16, when the other wanted to do the same for his children, whereas in the present case the dispute was between the company and a shareholder who became a shareholder in contravention of art 31 and who now challenged, on the ground of art 31, the transfer of certain members' shares to a non-member company which was a family company of the transferor members. In that case Fullager J would have ordered rectification only if the plaintiffs were prepared to agree to a corresponding rectification affecting them. In the present case no question arose of a corresponding rectification affecting the respondents' original 59,400 shares. The appellants could not be heard to question the transfer of those shares to the respondents because they themselves through their directors had acquiesced in the transfer. From the second of the three passages by Fullager J that I have just quoted, it would seem that the circumstance that Fullager J regarded as most justifying or compelling refusal of rectification unless the plaintiffs were prepared to agree to a corresponding rectification was that their objection to the transfer to William's children was taken with an improper motive. No such motive was imputed to or shown in the respondents in this case.

For those reasons, in my opinion the decision of Fullager J ought not to be applied in the circumstances of this case.

Although, as I said, in his initial or main oral submission in the appeal the appellants' counsel only raised the question of discretion, in his reply to the oral submission of the respondents' counsel he raised another point, and that had to do with the fact that two of the four directors of the appellant company who approved the transfers to Constant Aim, namely Chin Yim Tong and Chin Yim Kuan, were also directors of the respondent company. Although the appellants' counsel did not actually say so, he must have meant that therefore the respondent company had acquiesced in the transfers to Constant Aim in disregard of art 31 and ought not to be allowed

to challenge them. The point had not been raised in affidavit and the reply of the respondents' counsel was simply that there was no proof, which was of course true, that in approving the transfers those two persons, apart from acting as directors of the appellant company, were also acting as representatives of the respondent company so as to render their act of agreeing to the transfers attributable to the respondent company. That, to my mind, was a complete answer to that point.

As the appellants failed on the points raised in their counsel's oral submission, being the only points that I understood they wished to raise in the appeal, the appeal had to be dismissed. In the event, it was dismissed with costs and with an order that the deposit be paid to the respondent company towards taxed costs.

My learned brothers, Abdul Hamid Mohamad and Mohd Noor Ahmad JJCA, who have read the draft text of these grounds of judgment, concur therewith.

Order accordingly.

Reported by Mariette Peters-Goh